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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~1042~~ 66

WILLIAM A. REILING,

Petitioner,

vs.

BELDIN H. LOFTSGAARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

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No. .....

WILLIAM A. REILING,

Petitioner,

vs.

BELDIN H. LOFTSGAARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and decision of the Supreme Court of the State of Minnesota, made and entered January 3, 1964, and the order denying reargument and rehearing dated February 6, 1964, and the judgment made and entered pursuant thereto on April 8, 1964, in the above entitled case, wherein it was entitled BELDIN H. LOFTSGAARDEN, Appellant, vs. WILLIAM A. REILING, Respondent.

CITATION TO OPINION BELOW

The report of the opinion and decision rendered in the Supreme Court of the State of Minnesota is reported in 126 N.W. 2d 154 (January 3, 1964), — Minn. —, rehearing denied February 6, 1964. A copy of said opinion is appended hereto.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on January 3, 1964, and Petition for Rehearing was denied on February 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the Seventh Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits the Minnesota Supreme Court from making a finding of a material fact when no record of the evidence taken in the lower court was submitted to the Minnesota Supreme Court, and the said Minnesota Supreme Court based its entire decision and judgment upon such fact, on the ground that such action deprives petitioner herein of the right to trial by jury and deprives petitioner herein of property without due process of law and denies him the equal protection of the law.

2. Whether the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits an action for libel by a public official against a citizen and resident of the community that said public official is servicing, based on a written pamphlet distributed within the community, either as an absolute and unconditional privilege to criticize official conduct or as being dependent upon such candidate to show with convincing clarity actual malice, either in the knowledge that it was false or with reckless disregard of whether it was false or not.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional and statutory provisions involved are:

1. "Article I.

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. "Article VII.

   In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

3. "Article XIV.

   Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

The Supreme Court of Minnesota, in this case, overruled and reversed the lower district court order granting defendant's motion for judgment notwithstanding verdict, and remanded the case to the lower court with instructions that judgment be entered for plaintiff for damages in the amount

set out in the order of verdict, the same being for $5,000 punitive damages. Respondent, the village attorney for the Village of Roseville, Minnesota, instituted the action alleging he had been libeled by a printed sheet (Record pp. 4, 5, 6, f. 1) circulated in the Village of Roseville by petitioner William A. Reiling prior to and in conjunction with a village election to be held on December 2, 1958. Upon the ensuing trial a jury verdict was returned awarding respondent zero general damages and $5,000 punitive damages (Record p. 7, f. 2). Upon petitioner's motion for an order for judgment notwithstanding the verdict of the jury (Record pp. 8, 9, f. 1), the trial court granted same without indicating the grounds for its orders other than a memorandum attached which was not incorporated in its order (Record pp. 10, 11, f. 1).

A Petition for Rehearing was filed in the Minnesota Supreme Court and the Court was asked to rule on the United States constitutional issues raised therein. This petition is appended hereto. The Minnesota Supreme Court denied a rehearing without stating that it had ruled on these constitutional questions raised in the petition. The Court's order is appended hereto; and it is respectfully suggested that Reiling has properly raised these constitutional issues and that the Minnesota Supreme Court, by its order denying a rehearing, has determined that Reiling's rights thereunder were not violated.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Minnesota upon the records presented to it by respondent, upon respondent's appeal from the order of the lower court granting judgment to defendant, notwithstanding the verdict of the jury, de-

nies to petitioner his basic rights granted under the Seventh Amendment of the United States Constitution in that it in fact denied to him a trial by jury, and further, by arbitrary review of the matter denied to petitioner the equal protection and freedom from the taking of property without due process of the law as granted under the Fourteenth Amendment to the Constitution of the United States.

It is important to note and realize that the only records produced by respondent in his appeal to the Supreme Court of Minnesota were limited to the following:

(a) Complaint
(b) Answer
(c) Jury verdict
(d) Notice of motion of defendant
(e) Order of trial court granting defendant's motion for judgment notwithstanding the verdict
(f) Memorandum of trial court

As such, it is obvious that none of the actual evidence presented at the trial of this case was before the Supreme Court of Minnesota when the matter was heard by them.

Upon what, then, did they base their decision, and did their decision deny to petitioner his constitutional rights?

The Supreme Court of Minnesota, in arriving at its decision, stated:

> "Although we have not been provided with a settled case, it is clear that the order of the trial court *must* have been based on the ground that in a libel per se action * * *" (Italics supplied) (App. p. 19, f. 2),

and then went on with the balance of its decision.

Petitioner at this point makes no argument on whether the decision was proper or correct, for such consideration is immaterial with regard to this issue.

What petitioner does object to is that the Supreme Court of Minnesota laid down a ruling regarding libel per se cases and made an assumption that it was a libel per se case it was dealing with, when, in fact, no evidence to that effect—and, as indicated, no evidence of anything—was before the Court.

To arrive at this conclusion the Supreme Court of Minnesota would have had to give evidentiary weight of the highest degree to the memorandum of the trial court, which memorandum was not made a part of the trial court's order granting to defendant judgment notwithstanding the verdict.

This memorandum is the only part or portion of the record before the Supreme Court of Minnesota that indicated in any manner or sheds any light upon the nature of the alleged libel or what any evidence was.

While our Minnesota Supreme Court has recognized that a memorandum can be used for a very limited purpose—

> "The memorandum is not made a part of the Court's findings and conclusions, and under the doctrines of this court, while it may be referred to to cast light thereon when the findings are not clear, it may not be used to impeach, contradict or overcome them when they are positive and explicit." *Johnson v. Johnson*, 233 Minn. 420, 27 N.W. 2d 420 (1947).

They have also indicated and stated, that insofar as it is attempted to be relied upon as evidence of what happened in the trial, the court can disregard it.

> "Moreover, the statement referred to in the trial court's memorandum may be disregarded as it is not a part of his findings." *State v. E. A. H.*, 246 Minn. 299, 75 N.W. 2d 195.

Thus, it is obvious that the Supreme Court of Minnesota, in arriving at its decision in overruling the trial court's

order, went beyond the scope of their own rulings to do so. But, it is recognized that our constitutional guarantees do not extend to a guarantee of uniform decisions of our state courts, and the non-uniformity is not the grounds of petitioner's complaint.

Petitioner's complaint is that in exceeding its own described jurisdiction to modify or change lower court decisions the Minnesota Supreme Court in effect overlooked the safeguards and constitutional reasons for the rules of law set out above, and effectively denied to petitioner his right to jury trial, for what the Court in effect did was to pass on a question of fact and law without having any evidence before it and substituting for such evidence a memorandum of the trial court, which may or may not be an accurate reflection of the prior proceedings before the jury, or which might be merely a personal interpretation, or which might be slanted in an attempt to sustain and justify the court's order—but it is not evidence, and yet in our case it carries more weight and credibility than all of petitioner's witnesses—without ground or room for objection—and in reality denies to petitioner his constitutional right to trial by jury and in addition it effectively deprives him of his property without due process and equal protection of our laws.

It is of equal importance to note that the Court in arriving at decision stated:

> "The defendant, whose false charges have been circulated * * *" (App. p. 21, f. 1).

which apparent conclusion of fact it took from the meager record before it. It does not appear that the record as presented in any way is sufficient or in any way satisfies the standards required by this Court if the constitutional free-

dom of free speech is to be curtailed, as stated by this Court thusly:

> "* * * we consider that the proof present to show actual malice lacks the convincing clarity which the constitutional standards demand, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law." *The New York Times Company v. Sullivan*, citation 84 S. Ct. 710.

As stated, without a full record before them, our Court could in no way determine or pass upon this constitutional issue and it could in no way ascertain whether or not the evidence had or lacked the convincing clarity which the aforesaid constitutional standards demand.

The lack of true evidence—the finding of material facts by the Minnesota Supreme Court—and the Minnesota Supreme Court decision based on evidentiary facts—all without any record before it violates the petitioner's right to trial by jury and constitutes the taking of property without due process.

2. The decision of the Supreme Court of Minnesota gives a scope and application of the law of libel so restrictive of the right of a citizen to protest and to criticize official conduct that it abridges the freedom of the press as that freedom has been defined by the decisions of this Court. It transformed the action for defamation from a method of protecting private reputation to a device insulating government against attack. If the judgment stands, its impact will be grave. It effectively silences a public citizen from crying out about abuses of officials in office, and such judgment, if allowed to stand, will further act as a silencer of the press and other publications and deter them from voicing their grievances against the agencies of government.

First, the doctrine set out by the court below is that a public official is entitled to recover punitive damages for a publication critical of the official conduct of such public official, the publication being libelous per se, unless the jury is persuaded that it is entirely true.

This principle of liability, resting as it does upon a "common law concept of the most general and undefined nature" (*Cantwell v. Connecticut*, 310 U.S. 296, 308), is indistinguishable in its function and effect from the proscription of seditious libel, which the verdict of history has long deemed inconsistent with the First Amendment. *See Holmes J. Abrams v. United States*, 250 U.S. 616, 630; Chaffee, *Free Speech in the United States* (1941), pp. 27-29. In place of fine and imprisonment as the repressive sanction, damages are authorized "not alone to punish the wrongdoer, but as a deterrent to others similarly minded", and the damages are fettered by "no legal measure" of amount. Such damages are no less apt than criminal conviction to stifle that "free political discussion" which that Court has deemed the security of the Republic, the very foundation of constitutional government." *DeJonge v. Oregon*, 299 U.S. 353, 365.

There are, indeed, respects in which the private action brought by an aggrieved official may be more repressive than a prosecution for seditious libel. There is no requirement of an indictment and the case need not be proved beyond a reasonable doubt. It need not be shown, as the Sedition Act requires that the defendant's purpose was to bring the official "into contempt or disrepute" (Act of July 14, 1798, 1 Stat. 596): A statement adjudged libelous per se is presumed to be "false and malicious". Nor is it necessary, on the other hand, that there be proof of injury in fact to the official's

reputation. It is enough that if the criticism were believed it would "tend" to diminish his repute with members of the public.

We submit that such a rule of liability cannot be reconciled with this Court's ruling on the scope of freedom of the press, safeguarded by the Constitution. Those rulings have been adequately summed up by this Court in the case of *The New York Times Company v. Sullivan*, supra.

As the Court stated in this case:

> "Debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

Rather than recognizing such rule, the Minnesota Supreme Court has taken the reverse course, or as stated in their opinion:

> "The main reason for punitive damages in action for libel is to deter false, malicious and provocative attacks upon a person's reputation. The need for such a deterrent is at least as great where the person libeled cannot show actual loss in money caused by the false statement, as where some measurable damage is provable by the plaintiff. The defendant whose false charges have been circulated should not be the beneficiary of the circumstance that the plaintiff's character is so well established among his business and professional associates as to preclude proof of specific loss springing from communication of the libel." (App. p. 20, f. 1)

Such a statement appears to specifically contradict the expression of the applicable standards set forth by this Court in *The New York Times Company v. Sullivan*, supra.

This Court further recognized that where the speaker has the burden of proving truth, the protection and safeguards

guaranteed under our Constitution cannot hope to survive; for "that erroneous statement is inevitable in free debate" and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive."

Whether this decision must be reversed on the grounds as indicated by Justice Black in his separate opinion rendered by this Court in the case of *The New York Times Company v. Sullivan*, supra, wherein he stated:

> "I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a state's power to award damages to 'a public official against critics of his official conduct', but completely prohibits a state from exercising such a power",

or under the rule laid down by the majority of the Court in the aforesaid *The New York Times Company v. Sullivan*, supra, wherein this Court stated:

> "Applying these standards we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under proper rule of law",

it is obvious that under either rule respondent here did not present to the Minnesota Supreme Court any sufficient ground upon which that Court could or should so readily trespass upon petitioner's constitutional rights; and, having asked the Minnesota Supreme Court to infringe upon such constitutional rights, it was incumbent upon respondent to show the clear need before the Minnesota Supreme Court should have so acted. Without the convincing clarity which is necessary to set aside the constitutional rights as delineated by this Court, the action of the Minnesota Supreme Court is erroneous and unfounded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

ROBERT A. GEARIN
Attorney for William A. Reiling, Petitioner
W-1153 First National
Bank Building
St. Paul 1, Minnesota

APPENDIX

PETITION FOR REARGUMENT FILED

STATE OF MINNESOTA,
OFFICE OF CLERK OF SUPREME COURT
St. Paul, Minn.
January 13, 1964

39015

BELDIN H. LOFTSGAARDEN, *Appellant*
vs.
WILLIAM A. REILING, *Respondent*

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs, are stayed pending its determination.

Yours respectfully,

MAE SHERMAN
Clerk, Supreme Court

A petition for reargument does not stay taxation of costs and disbursements.

PETITION DENIED

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
St. Paul, Minn.
February 6, 1964

39015

BELDIN H. LOFTSGAARDEN, *Appellant*
vs.
WILLIAM A. REILING, *Respondent*

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN
Clerk, Supreme Court

STATE OF MINNESOTA

IN SUPREME COURT

File No. 39015

BELDIN H. LOFTSGAARDEN, *Plaintiff-Appellant*

vs.

WILLIAM A. REILING, *Defendant-Respondent*

PETITION FOR REHEARING

Petitioners are the attorneys for the respondent, William A. Reiling.

This Court, on January 3, 1964, filed an opinion reversing the judgment of the lower court in granting to defendant-respondent his Motion for Judgment Notwithstanding the Verdict of the Jury, pursuant to Rule 50.02 of the Minnesota Rules of Civil Procedure.

It is obvious from a reading of this Court's opinion, and appellant's supporting brief, that the rule of law set forth in this Court's opinion of January 3, 1964, applies to those classes of cases which involve specifically libel per se.

If we are not dealing with libel per se, obviously the rule of law set forth would have no applicability.

This, then, is the crux of the matter.

Petitioner states that on the Record before this Court there is no basis in law or fact upon which a determination can be made whether this is a case of libel per se or not. The only possible reference to such fact is contained in the memorandum of the trial court set out in the Record in pages 10 and 11 thereof, which appellant's attorney, in response to query by His Honor, Judge Otis, admitted should not and does not constitute a portion of the Record before this Court, which determination is supported by the established law of this state.

Insofar as the Record is concerned, the judgment of the lower court granting respondent's motion may have been based on any of the five grounds as set out in the Motion, Record page 8.

This Court, in arriving at its decision, stated:

> "Although we have not been provided with a settled case, it is clear that the order of the trial court must have been based on the ground that in a libel per se action, punitive damages are not recoverable in the absence of actual damage."

Petitioner suggests that such inference is not clear and goes beyond the Record presented and puts this Court in a position of either going beyond the Record, or, in the alternative, sitting as a trial court and determining this issue on appeal.

Petitioner urges that to do so violates not only the basic concepts of review and jurisdiction of this Court, but further would violate defendant-respondent's right to trial by jury pursuant to the Seventh Amendment to the United States Constitution and would violate his right to due process under the Fourteenth Amendment to the United States Constitution, in that in effect it deprives the respondent of property without due process of law, and denies him the equal protection of the law in that this Court is sitting as judge and jury of facts which are not before it.

Firstly, respondent was not an aggrieved party in the lower court; by reason of this Court's ruling, he now is. But, he has become an aggrieved party without the benefit of complaint. Respondent raised five issues in his Motion for Judgment Notwithstanding the Verdict of the Jury, any one of which may have in truth and in fact been sufficient to sustain said motion. Respondent now, and at no time, will have a fair and just opportunity to be heard, through no fault of his, but because appellant chose, of his own free will, to bring an incomplete Record before this Court.

Secondly, if we are not in fact dealing with libel per se, actual damages would have to be found before punitive damages are allowable, for it is only in such cases as libel per se where general damages are presumed. The jury found no actual damages nor is there any record to show proof of any pecuniary loss by appellant and if this is in law, not a libel per se case, then the grant of punitive damages would be in error and the trial court correct in its decision.

The further constitutional question, under the First Amendment to the United States Constitution, was also raised by defendant-respondent's motion in the lower court in that, under the circumstances, such as we have here, to punish this defendant by awarding money damages against him is to deny him his right to freedom of speech as guaranteed to him under the aforesaid First Amendment to the United States Constitution.

Respondent intends to file a Petition for Review by the United States Supreme Court if this Petition for Rehearing is denied, and specifically requests that this Court rule on the United States constitutional questions raised herein.

The Court is respectfully requested to:

(1) Set aside its Order Reversing the Judgment of the Lower Court; or if this be denied,

(2) To state in its opinion that it is considered that the United States constitutional questions contained herein relating to Amendments One and Seven and the due process clause of Amendment Fourteen.

Respectfully submitted,

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BELDIN H. LOFTSGAARDEN, *Appellant*

v.

WILLIAM A. REILING, *Respondent*

No. 39013

Supreme Court of Minnesota
Jan. 3, 1964

Rehearing Denied Feb. 6, 1964

Libel action. The District Court, Ramsey County, Edward D. Mulally, J., ruled that the publication was libelous per se and the jury returned a verdict for the plaintiff assessing actual damages as "$0" and punitive damages at $5,000. Defendant's motion for judgment notwithstanding the verdict was granted. The plaintiff appealed. The Supreme Court, Sheran, J., held that punitive damages are recoverable for libel per se without proof of actual damages.

Reversed and remanded with instructions.

See also 265 Minn. 575, 120 N.W.2d 857.

LIBEL AND SLANDER 120(1)

Punitive damages are recoverable for libel per se without proof of actual damages.

Syllabus by the Court

In an action for libel per se, punitive damages are recoverable without proof of actual damages.

Miley & Narveson and David W. Nord, St. Paul, for appellant.

Robert A. Gearin, Donahue, Kelly & Smith, St. Paul, for respondent.

SHERAN, Justice.

Appeal from a judgment of the district court.

In a libel action the jury returned a verdict for the plaintiff assessing actual damages as "$0" and punitive damages at $5,000 after the court had ruled that the publication was libelous per se. Defendant's motion for judgment notwithstanding the verdict was granted and judgment was directed in favor of defendant. Although we have not been provided with a settled case, it is clear that the order of the trial court must have been based on the ground that in a libel per se action punitive damages are not recoverable in the absence of actual damage.

There is no statute or controlling Minnesota decision making recovery of punitive damages in an action such as this dependent on the existence of actual damage. Erickson v. Pomerank, 66 Minn. 376, 69 N.W. 39, holds only that exemplary damages claimed by the plaintiff on the theory that defendant maliciously interfered with a natural watercourse could not be recovered where it was established by the jury's verdict that defendant did not illegally alter the watercourse involved. And, although Meixner v. Buecksler, 216 Minn. 586, 13 N.W.2d 754, cites the Erickson case in support of the dictum that exemplary damages may be allowed only when the plaintiff is entitled to compensatory damages, the holding of

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1. See, Hammersten v. Reiling, 262 Minn. 200, 115 N.W.2d 259, certiorari denied, 371 U.S. 862, 83 S.Ct. 120, 9 L.Ed.2d 100; High v. Supreme Lodge, 214 Minn. 164, 7 N.W.2d 675, 144 A.L.R. 819.

the Meixner case is simply that under Minn.St. 561.04, where a party seeks recovery of "treble the amount of damages which may be assessed," there must be actual damage in some amount before failure to triple the award can cause prejudice.

The main reason for punitive damages[2] in actions for libel is to deter false, malicious, and provocative attacks upon a person's reputation. The need for such a deterrent is at least as great where the person libeled cannot show actual loss in money caused by the false statement as where some meas-

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2. For the historical background of punitive damage , see 1 Sedgwick, Damages (9 ed.) § 349; 70 Harv.L.Rev. 517; Huckle v. Money, 2 Wils. 205, 95 Eng.Rep. 768; Tullidge v. Wade, 3 Wils. 18, 95 Eng.Rep. 909. The 18th-century English courts noted that such allowance helped to preserve peace and discourage dueling. 1 Sedgwick, Damages (9 ed.) § 350. This is not a compensatory consideration. It is an ancient principle. See, 70 Harv.L.Rev. 519; Holmes, The Common Law, pp. 24, 39-42; Exodus 22:9 (double damages for trespass); Statute of Gloucester, 1278 (6 Edwards I, c. 5), giving treble damages for waste. The Anglo-Saxon *wergeld* enforced heavy money damages against the insult of physical violence, calculated to encourage resort to the courts instead of to self-help.

See, 2 Greenleaf, Evidence (16 ed.) § 253, n. 2; 2 Sutherland, Damages (4 ed.) c. IX; McCormick, Damages, §§ 77, 118; Oleck, Damages to Persons and Property (Rev. ed.) c. XXVI; Note, 70 Harv.L.Rev. 517, 522; Pollock, Torts (15 ed.) pp. 141-144; Clerk and Lindsell, Torts (11 ed.) pp. 170, 545, 835; Gatley, Libel and Slander (4 ed.) pp. 647, 678; 25 C.J.S. Damages, § 117; 15 Am.Jur., Damages, §§ 270, 271; 33 Am.Jur., Libel and Slander, § 202.

"The actual pecuniary damages, in actions for defamation, as well as in other actions for *torts*, can rarely be computed, and are never the sole rule of assessment." Tillotson v. Cheetham, 3 Johns. (N.Y.) 56, 63. "Indeed, in many actions, such as slander, libel, seduction, etc., there is no measure of damages by which they can be given as compensation for the injury, but are inflicted wholly with a view to punish, and make an example of the defendants." Stimpson v. The Rail Roads (3 Cir.) 1 Wall.Jr. 164, 170. Accord, Day v. Woodworth, 54 U.S. (13 How.) 363, 14 L.Ed. 181.

urable damage is provable by the plaintiff.[3] The defendant whose false charges have been circulated should not be the beneficiary of the circumstance that the plaintiff's character is so well established among his business and professional associates as to preclude proof of specific loss springing from communication of the libel.[4]

We conclude that in actions for libel per se punitive damages are recoverable without proof of actual damage. The conclusion we have adopted, although contrary to the decisions of some states,[5] has respectable support in the authorities.[6]

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3. As stated in Prince v. Brooklyn Daily Eagle, 16 Misc. 186, 190, 37 N.Y.S. 250, 253: "A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages. It is in such cases that the rule illustrates its chief value and necessity."

4. In Reynolds v. Pegler, D.C., 123 F.Supp. 36, affirmed 2 Cir., 223 F.2d 429, certiorari denied, 350 U.S. 846, 76 S.Ct. 80, 100 L.Ed. 754, the law was stated to be that "the jury may award substantial exemplary damages even though no actual financial injury has been suffered." 123 F.Supp. 37. To hold otherwise "would require punitive damages to be determined in inverse ratio to the reputation of the one defamed." Id., 123 F.Supp. 38.

5. Annotation, 17 A.L.R.2d 527.

6. Restatement, Torts, § 908; 17 A.L.R.2d 545; McCormick, Damages, §§ 83, 118. In Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908, the verdict was the same as in the instant one, except that actual damage was in blank and not, as here, for "$0." The court said (215 Cal. 284, 9 P.2d 507, 81 A.L.R. 911): "Hence where, as here, the publication is * * * libelous per se, * * * a cause of action for actual or compensatory damages is conclusively established. [Citations omitted.] Respondent must, therefore, be held to have established her right to compensatory damages, and the fact that the jury, inadvertently or by some mischance, assessed the entire damages as exemplary, instead of segregating them, constitutes an error of form rather than of substance."

and represents what we consider to be the better rule in that it recognizes the intangible harm[7] caused by false, irresponsible accusations and the need for discouraging such conduct in the interests of social harmony.

The order of the trial court setting aside the verdict is reserved. The case is remanded with instructions that judgment be entered for plaintiff for damages in the amount set out in the verdict of the jury.

Reversed.

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7. "But if is doubtful whether the better view is not that they [exemplary damages] are consolatory rather than penal, resting upon the principle that where there is malice the plaintiff suffers from a sense of wrong, and is entitled to a *solatium* for that mental pain." Clerk and Lindsell, Torts (11 ed.) p. 170.

In Ley v. Hamilton, 153 L.T.Rep. 384, 386, the highest appellate tribunal in England stated with respect to damages for defamation: "They are not arrived at as the Lord Justice seems to assume by determining the 'real' damages and adding to that a sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large." See also, Boyd v. Boyd, 116 Va. 326, 82 S.E. 110, Ann.Cas.1916D, 1173; Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W.2d 247, 166 A.L.R. 99. In Gambrill v. Schooley, 93 Md. 48, 66, 48 A. 730, 733, 52 L.R.A. 87, 91, 86 Am.St.Rep. 414, 421, the court said: "The words used here being actionable per se, although there was no proof of actual and substantial damages sustained by the publications to Miss Willis [defendant's stenographer] of the two letters, the jury could not properly have been deprived of their discretion to give exemplary damages * * *."

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OCTOBER TERM, 1964

No. 66

WILLIAM A. REILING, *Petitioner*,

v.

BELDIN H. LOFTSGAARDEN, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

I

The Issues Are Defined by *New York Times Co. v. Sullivan*

The relevant case for our purposes is obviously *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Petitioner claims, in addition to his claim of an infringement of his freedom of speech, that he was denied a jury trial. This is quite untrue, as will appear below, but in any event he has no federal constitutional right to a trial by jury in state court. *Minneapolis & St. L. Ry. v. Bombolis*, 241 U.S. 211 (1916).

The *Sullivan* case holds that a state's manner of enforcing its civil libel laws may infringe the constitutionally protected

rights of freedom of speech and of the press. The law of Alabama, as there applied, was held constitutionally deficient in two respects:

(1) It does not require proof of "actual malice" (except in order to recover punitive damages) and does not permit the defense of fair comment unless the facts upon which the comment is based are in fact true;

(2) The court accepted as adequate proof of "actual malice" to go to a jury evidence which lacked the convincing clarity which the constitutional standard demands.

II

The Judgment Below Does Not Violate the Standard There Set Up

The law of Minnesota presents neither of these features, and is hence not constitutionally deficient as abridging freedom of speech or press.

A. *The substantive law of Minnesota accords with the standard.*

Minnesota requires a public official, before he can collect any damages, either compensatory or punitive, for libel, to prove actual malice. *Friedell v. Blakeley Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925). Thus the first point of attack upon Sullivan's judgment does not arise here.

B. *Petitioner has disabled himself from contending that the evidence does not support the verdict.*

The other question—whether the evidence *in this case* was such that it can constitutionally support the judgment—presents a greater problem, for here we are involved in a procedural difficulty of petitioner's own making. A short explanation of some of Minnesota's appellate procedure and how it was applied here is necessary.

This case was tried in the ordinary way of common-law actions in Minnesota—before a jury of twelve. Record, p. 7. The verdict was for plaintiff, with "$0 * * * for general damages and $5,000 for punitive damages." The trial judge, because he believed the law of Minnesota to be that one cannot have punitive damages unless there is an award of general or compensatory damages, ordered judgment for the defendant. Defendant (now petitioner) did not cause judgment to be entered on this order for about 7½ months. Plaintiff had meanwhile done nothing. (A judgment was at that time appealable in Minnesota within 6 months from its entry. M.S.A. §605.08. An order for judgment is not appealable at all.) Within the six-month period, but towards its end, plaintiff filed his appeal from the judgment to the Supreme Court of Minnesota.

At or about the same time as he filed his notice of appeal, plaintiff gave notice that he would propose the stenographic transcript of the trial as the "settled case" on appeal. The settled case is the only way in Minnesota by which the appellate court can be apprised of what took place at the trial. It partakes of the nature of a bill of exceptions to the extent

that it requires to be approved—"settled"—by the trial judge before it can be judicially noticed by the appellate court. In order to have a settled case, the proponent must propose it within certain time limits prescribed by Minn. R. Civ. P. 59.07. The trial judge may, in his discretion, extend these time limits, with or without a formal motion to that effect.

When plaintiff (respondent here) proposed the settled case, it was opposed by petitioner upon the sole ground that the proposal was not timely. The trial judge sustained the objection. Respondent Loftsgaarden obtained a writ of certiorari from the Minnesota Supreme Court to review this action. Petitioner Reiling successfully opposed such review. The Minnesota Supreme Court refused to reverse the trial judge. *Loftsgaarden v. Reiling*, 120 N.W. 2d 857 (Minn. 1963).

As a result of all this maneuvering, then, it was necessary to present respondent's case to the Minnesota court without a transcript of the evidence—that is, entirely upon the so-called "strict record." This means, generally speaking, only those papers which are properly filed with the clerk of the court of first instance: the pleadings, pretrial motions and orders, if any, the verdict, any postverdict motions and orders, and the judgment itself. That is the Record which has been submitted to this court in connection with the petition for certiorari.

For obvious reasons, Minnesota holds that the lack of a settled case rather severely restricts the scope of appellate review. For instance, whether the evidence supports the verdict cannot be considered in the absence of a report of the evidence. Nor can the propriety of the trial court's instructions to the jury be examined, since they are not reported.

As a practical matter, indeed, about the only question that can be presented in the ordinary case is whether the verdict supports the judgment, and that is all that was open to Mr. Loftsgaarden here.

Whether the verdict supported the judgment which was entered (for the defendant) turned, of course, on whether punitive damages can be awarded in the absence of an award of general damages. The Minnesota court held that they could, and consequently ordered judgment for the plaintiff, which has since been entered.

Now, the point of all this perhaps over-elaborate explanation is this—petitioner vigorously and successfully fought to prevent respondent from presenting a report of the evidence to the Minnesota Supreme Court. No doubt he thought it was to his advantage to do so. With this we cannot quarrel, though hindsight shows that graceful acquiescence in the untimeliness would perhaps have been better. But we can and do quarrel with him when he attempts to suggest that the lack of a transcript was imposed upon him *in invitum*, and that review of the (then non-existent) constitutional question of the adequacy of the evidence was denied him by anything other than the procedural impasse he worked hard to create. Had he permitted the Minnesota court to read the evidence, it would have been open to him to contend in support of the judgment below that the facts would not constitutionally support a finding of actual malice. The route he chose made this, and other similar contentions (as, *e.g.*, that some element of a cause of action for libel was missing as a matter of law), unavailable to him. Instead he contended

(see Respondent's Brief below) that (1) because of the lack of a settled case, *nothing* was presented for review(!), and (2) that there can be no punitive damages in the absence of an award of general damages.

Thus it appears that the petitioner wants this court to declare that a Minnesota Rule of Civil Procedure which he enthusiastically enforced denies to him a constitutional right. He would also have this court say to Minnesota that it must cease to enforce its rules of appellate procedure in any case where the defeated litigant may later claim that an examination of the evidence may be essential to the adjudication of a constitutional issue, even where it is that very litigant who demands that it enforce the rule. (Note that no constitutional issue had been raised by anyone at any time in this proceeding until the petition for rehearing was filed.) The question amounts to this: May one demand the enforcement of a rule, secure the court's acquiescence in his demand, and then claim that the court, by doing what he asked it, denied him a constitutional right?

Instead of making these facetious claims, petitioner should make available to this court the transcript of the evidence at the trial. Three copies exist, of which petitioner has one, respondent another, and the clerk of district court the third. We will be happy to submit our copy for the use of the court. We are confident that an examination of it will disclose that the jury's finding of actual malice has ample support, by constitutional or any other criteria. The court can thus satisfy itself that no true constitutional issue exists in this case.

CONCLUSION

The substantive libel law of Minnesota is not violative of the First Amendment, for it requires a public official to prove actual malice in order to recover any damages.

The Supreme Court of Minnesota had no report of the evidence available to it because petitioner insisted that it should not. He now claims that a necessary result of his success in that contention is a denial of his constitutional rights. This claim is not available to him under the circumstances.

In any event, we are quite willing to have this court read the transcript. Having done so, it will, we are confident, find no substantial constitutional issue to be presented.

Respondent requests that certiorari be denied.

Respectfully submitted,

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